PUBLIC PROSECUTOR

v.

AKIN KHAN ABDUL KHANAN

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[CRIMINAL TRIAL NO. 8 OF 1983]
9 OCTOBER 1985

CRIMINAL LAW AND PROCEDURE: *Charge of trafficking in dangerous drugs - Offence under s. 39B of Dangerous Drugs Act 1952 - Cautioned statement - Dialect not common to both recording officer and accused - Whether admissible - Presumptions under s. 37(d), (da)(vi) - Whether rebutted - Verdict.*

This was a charge under s. 39B of the Dangerous Drugs Act 1952 ("the Act") against the accused for trafficking in 951 grammes of cannabis. At the end of the trial within a trial, the cautioned statement was held to be inadmissible as it was taken in a language and dialect not common to both the recording officer and the accused indicating that they could not have fully understood one another adequately in the circumstances. The case for the prosecution depended mainly on the testimony of PW1, PW3 and PW8 who impressed the Judge as honest and truthful witnesses. The only discrepancy was the weight of the dried leaves.

Held:

[1] The presumptions raised by the prosecution under s. 37(d) and (da)(vi) of the Act were unrebutted by the accused.

[2] The accused's version was merely a concoction of the story.

[3] The accused's version had failed to rebut the presumptions raised by the prosecution and was in effect a mere denial of the charge calculated only to pervert the course of justice. It could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities.

[Accused sentenced to death.]

Cases referred to:
Tan Too Kia v. PP [1980] 2 MLJ 187
PP v. Ibrahim bin Mastari [1980] 2 MLJ 188

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(d), (da)(vi)

For the public prosecutor - Mohd., Azman bin Husin, DPP
For the accused (assigned) - Abdul Aziz bin Abdullah; M/s. Aziz Abdullah & Co.

[Editor's Note: The judgment of the Supreme Court, on appeal from this decision, is reported at [1987] 1 CLJ at p. 348.]

JUDGMENT

Abdul Malek Ahmad J:

The charge against the accused read as follows:

> That you on 21 August 1983, at about 12.40 p.m., at Kampong Ketil, Pengkalan Kubur, in the District of Tumpat, in the State of Kelantan, did on your own behalf traffic in a dangerous drug, to wit 951 grammes of cannabis, and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952, punishable under s. 39B(2) of the same Act.

I shall review the prosecution evidence at this stage. PW1, a chemist attached to the Jabatan Kimia, Kuala Terengganu, gave evidence that on the 24 August 1983 at 12 noon he received a parcel marked "X" from Inspector Yusoff Karim (PW10) in relation to Pengkalan Kubor Report No. 343/83. After physical examination of the 540 sticks of dried leaves contained therein and a chemical analysis of 54 sticks, he concluded that the dried leaves were cannabis the total weight of which was 951 grammes. PC 89402 of the Tumpat police station (PW2) testified that on PW10's instructions she took three photographs at the scene (P6 A-C).

The complainant PC Wahed bin Yusof (PW3) told the Court that on the 21 August 1983 at around 12.40 p.m. acting on information he had stopped the accused at Kampong Ketil, Pengkalan Kubor carrying a bag (P7) in which he found yellow pants (P8), a kopiah (P9), brown rosary beads (P10), blue and brown striped kain pelekat (P11), prayer mat (P12) and green leaves (P3). With the help of one Hassan bin Idris (PW8) who happened to pass by coincidence, he fetched his motorcycle at his house and took the accused and the exhibits to the Pengkalan Kubor police station where he lodged a report (P13). Under cross-examination he stated that he was not on duty at the relevant time and did not carry handcuffs. He added that when he stopped the accused, the accused opened the bag and he (PW3) saw the leaves when he flipped its contents in the presence of the accused and PW8. He admitted that he did not mention PW8 in his report but denied that there were two other persons present then.

He also gave evidence that while PW8 held the accused, he went back to his house a short distance away to fetch his handcuffs with the bag P7 but did not carry it into the house but left it outside on the doorstep. He said he took only one or two minutes to fetch the handcuffs and could see the bag as he had opened the kitchen door wider at that time. He denied putting the cannabis in the bag at that stage. He clarified that although his report was not complete, it was however true. He also said that when he handed the exhibits to PW4, the latter had counted the sticks of dried leaves and weighed them and had found that there were 540 sticks weighing 1250 grammes.

The OCS of the Pengkalan Kubor police station (PW4) gave evidence that PW3 had arrived at the police station at 1 p.m. and told him of the arrest. At 2.05 p.m. PW3 had handed the accused and exhibits to him and had lodged P13. PW4 said that, among the exhibits, he counted and found that there were 540 sticks of dried leaves which were weighed at 1250 grammes. At 2.10 p.m. he had informed PW10 and had handed the accused and the exhibits to him when the latter arrived at about 3.15 p.m.

The prosecution next called Roni alias Jani bin Bakar (PW5) and his wife Asmah bte Wan Din (PW6) who both stayed at Kampong Bunga, Kuala Besut, Jerteh, Terengganu and were originally from Thailand. Both of them testified that they did not know the accused at all. DPC 57160 (PW7) told the Court that on PW10's instructions, he took two photographs of the exhibits (P14 A and B) on 22 August 1983 at about 12 noon at the Tumpat police station.

Hassan bin Idris (PW8) gave evidence that on the date and time in question he was walking home when he saw PW3 checking the accused and saw green leaves in the bag the accused was carrying. PW3 then asked him to hold the accused while he went to fetch the handcuffs at his house nearby after which PW3 handcuffed the accused and took him to the police station. PW8 maintained that there were only the three of them at the scene. Under cross-examination he said he held the accused while PW3 went into the house for two minutes to fetch the handcuffs. He stated that PW3 left the bag at the door-step at that stage and there was no one else present. Later while still being cross-examined, he told the Court that three young men came only after PW3 had taken the accused to the police station.

The investigating officer (PW10) stated on oath that on being informed of the case by PW4, he had proceeded to the Pengkalan Kubor police station where he took custody of the accused and exhibits from PW4. On the next day at 11 a.m. he had visited the scene with PW2 and PW3. He said he himself had sent the dried leaves to PW1 for analysis on 24 August 1983 and fetched them on 3 September 1983.

I shall now deal with the trial within a trial to determine the admissibility of the cautioned statement (ID15) made by the accused to PW9 on 22 August 1983 at about 2 p.m. PW9 (TPW1) told the Court that the accused agreed to give the cautioned statement and he had then administered the caution. He added that the recording, which he typed out straight away, was in normal Malay as the accused's mother tongue was Malay but in the Kelantanese dialect and it had gone on smoothly without any interruption up to 5 p.m. after which the accused thumbprinted and TPW1 countersigned it. Under cross-examination he stated he was not well versed in the Kelantanese dialect and although the accused spoke in the Kelantanese dialect he recorded it in standard Bahasa Malaysia. As requested by learned Counsel for the accused, TPW1 brought along his personal diary on the following day and read out the entries made for 21 & 22 August 1985.

The investigating officer (TPW2) confirmed that he had requested TPW1 to take a cautioned statement from the accused on 22 August 1983 at 12 noon and did not force, threaten or promise the accused to give the cautioned statement. He said TPW1 recorded the cautioned statement from 2 p.m. to 5 p.m. on the same day and handed it to him after its completion.

The accused gave evidence that when PW3 took him and the bag to Pengkalan Kubor police station he was taken to an Indian corporal who slapped him more than once. He did not see the bag any more as it was taken to another room. PW3 then gave him drinks and cigarettes before he was taken to Tumpat police station by TPW1 and TPW2 and other police personnel. There he was taken to a room by TPW2 where there was a policeman in uniform who poked his stomach with a stick many times. The next morning he said he was taken to a room where there was TPW1 and a Malay lady present. TPW1 told him there was going to be a question and answer session. He denied any caution being administered to him. He added that TPW1 wrote on many pieces of paper and then typed it out. He said the Malay lady was present all long and she was typing and he was given drinks, cakes and cigarettes during that period.

The accused also told the Court that his mother tongue was Pakistani and that he did not speak Malay well. He said he spoke Thai and Pattani Malay. He further said the cautioned statement was never read back to him and he was forced to thumbprint.

Having considered the evidence in the trial within a trial and based on the decisions in *Tan Too Kia v. PP* [1980] 2 MLJ 187 and *PP v. Ibrahim bin Mastari* [1980] 2 MLJ 188, I was of the considered opinion that ID15 should be held inadmissible as it was taken in a language

and dialect not common to both the recording officer and the accused indicating that they could not have fully understood one another adequately in the circumstances and also in view of TPW1's admission that the words in the cautioned statement were not the accused's exact words but words standardised by TPW1 into Malay as they went along.

The case for the prosecution therefore depended mainly on the testimony of PW1, PW3 and PW8. Having seen and heard them, they impressed me as honest and truthful witnesses and I had no reason to doubt their evidence. PW3 and PW8's story were not shaken despite the lengthy cross-examination by Counsel. Their testimony was also amply corroborated by PW2, PW4, PW7 and PW10 on all material particulars. The admission by PW3 of not naming PW8 in P13 was not, to my mind, a fatal flaw to the prosecution's case. The only discrepancy, if it could be called such, was the weight of the dried leaves when weighed by PW4 at 1250 grammes and the weight given by PW1 at 951 grammes but I was satisfied, without the necessity of any explanation from any party, that this was because PW4 had in fact weighed the dried leaves with its sticks and strings and PW1 had, as all chemists do, given the net weight of the cannabis after deducting the weight of the sticks and strings from the total weight of both the cannabis and the sticks and strings. Despite persistent questions by learned Counsel for the accused, there was not evidence that the cannabis had been tampered at any stage from the time it was found on the accused till it was produced in Court. As regards the leaving of the bag at the doorstep of the side door of his house, PW3 had explained he did not bring it along with him into the house as it contained something illegal and I accepted his explanation. At the same time I found that this was in fact the wiser thing for him to do since he did not lose sight of it when he went into the house for two minutes to fetch the handcuffs and this at the same time shattered the defence contention during cross-examination that PW3 had brought the bag into his house to put the cannabis into it. I have also carefully gone through the so-called contradictions in the prosecution evidence as submitted by learned counsel for the defence and was of the view that the inconsistencies were trivial and did not affect the crux of the prosecution's case. PW3 had also while under cross-examination remained silent when he was asked why he entered his house, why there omissions in the police report and why he did not get assistance. If found that this did not in any way affect his credibility as a witness as he had in fact explained on all these three matters in the other parts of his evidence and had found it redundant and ridiculous to answer the same questions again and again.

In consequence therefore, I found that the prosecution had in fact raised the presumptions under s. 37(d) and (da)(vi) of the Dangerous Drugs Act 1952 which if unrebutted would warrant a conviction against the accused. Accordingly I called for the defence.

The accused, in his sworn testimony, told the Court that he had in fact come to Jerteh, Terengganu from his hometown Narathiwat in Thailand on 1 July 1983 to collect his father's debt from one Roni @ Ghani bin Yusoff. When he was told by Roni that the latter could not pay, he had asked that he be allowed to stay and work in Jerteh but was told there was no vacancy. The accused added that he then returned to Thailand. On 5 August 1983 he had met Roni at Yala in Thailand who told him that there was then a vacancy in Jerteh but the accused could not go there on that date as he had work in Yala.

On 21 August 1983 the accused said he crossed over to Malaysia without any travel documents carrying his bag (P7) with P8, P9, P10, P11 and P12 but not the dried leaves P3. He was arrested on the Malaysian side by someone alone on a motorcycle who identified himself as a police officer and who frisked through the contents of P7 and told him that he was being arrested for not having travel documents. He was then taken to a house where

the arresting officer took the bag into the house for ten minutes leaving the accused outside. The accused stated that there were three men present outside the house who asked him to run away but he refused as he said he had committed no offence except for entering the country without any travel documents. The arresting officer then came out, he added, handcuffed him and arrested him and took him to the Pengkalan Kubor police station where he was slapped by a corporal. He was not shown the cannabis there. He was then taken to Tumpat police station where one of the officers poked his chest with a piece of wood. It was here he was shown his bag and its contents which included the dried leaves whereupon the accused said he had told them that the dried leaves were not his. Under cross-examination he stated that he was a cloth merchant in Thailand.

At this juncture, it is pertinent to note that PW10 had in fact earlier told the Court in his evidence that in view of the mention of the name Roni by the accused in ID15, he had in fact located one Roni in the relevant area in the form of PW5 who together with his wife PW6 had denied knowing the accused although their hometown was also Narathiwat. Be that as it may, the accused had told the Court that he had come to see his friend Roni (not PW5) on 1 July 1983 to collect 20,000 bahts owing to his father. When Roni said he could not pay, why was it then necessary for the accused to tell Roni that he was forced to stay on and work in Jerteh considering that he sold clothes in Narathiwat and there was no other evidence explaining why the change of job and place was needed because Roni was not settling his debt? As regards his arrest, the accused's version differed substantially with that of the prosecution. He said he was arrested by a person who was alone on a motorcycle for entering the country without any travel documents who had then left him outside his house while he went in with the bag the accused was carrying. He had also told the Court that the offence of not having travel documents was minor as all his friends had told him it was not necessary and that was why he did not run away when suggested by the three men outside the arresting officer's house. This piece of evidence was no doubt put forward to hint to the Court that the arresting officer had put the cannabis into the bag during this period. This is in the light of the prosecution evidence that PW8 was present when PW3 was arresting the accused, that PW3 had left P7 at his kitchen doorstep for two minutes when he fetched the handcuffs and that there was no one else present.

Having seen and heard the accused and considered his defence as a whole, I did not believe him. In view of PW3 and PW8's earlier testimony, I held that the accused's version was merely a concoction to suggest that it was PW3, when he went into the house alone with the bag leaving the accused outside, or subsequently somewhere in one of the police stations, who had put in the cannabis into the accused's bag so as to frame the accused up for this offence. In the absence of any grudge or misunderstanding, surely if PW3 was going to nail the accused on a capital charge such as this, he would not have left the accused unguarded outside his house while he took steps to plant the incriminating evidence. He had ample time at the Pengkalan Kubor police station to do so if, as the accused had alleged, the accused had not seen the bag until much later at the Tumpat police station. As regards this fact that the accused said he never saw the bag and its contents at Pengkalan Kubor police station after the cannabis had been put in, PW4 had earlier stated, and I had accepted his evidence, that the bag and its contents were examined in the accused's presence at the Pengkalan Kubor police station and P3 was also counted at the same time. The accused's allegations of assault at both the Pengakalan Kubor and Tumpat police stations were also not substantiated by any other evidence. Further the contents in P7 does not in any way support the accused's contention that he was going to stay and work in Jerteh for an indefinite period.

Having deliberated dutifully on the defence, I was of the considered opinion that the accused's version had failed to rebut the presumptions raised by the prosecution and was in effect a mere denial of the charge calculated only to pervert the course of justice. It could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities.

Accordingly I sentenced him to death on finding him guilty as charged.

Also found at [1987] 2 CLJ 244